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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 CAHRLES EDWARD VAN NORT,
12 CDCR #C-09149,

13 Plaintiff,

14
15
16 VS.
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19 EDMUND G. BROWN, Governor;
20 Dr. JEFFREY BEARD, Ph.D, Secretary;
21 J. D. LOZANO, Chief, Office of Appeals;
22 C. ZUNIGA, Appeals Examiner;
23 D. PARAMO, Warden;
24 W. SUGLICH, Assoc. Warden,

25 Defendants.

Civil No. 14cv1663 LAB (KSC)

ORDER:

**(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED IN
FORMA PAUPERIS
[ECF Doc. No. 2]**

**(2) DISMISSING COMPLAINT
FOR FAILING TO STATE
A CLAIM AGAINST
DEFENDANTS BROWN AND
BEARD PURSUANT TO
28 U.S.C. § 1915(e)(2)(B)(ii)
AND § 1915A(b)(1)**

AND

**(3) DIRECTING U.S.
MARSHAL TO EFFECT
SERVICE OF AMENDED
COMPLAINT UPON
REMAINING DEFENDANTS
PURSUANT TO
FED.R.CIV.P. 4(c)(3) AND
28 U.S.C. § 1915(d)**

26 Charles Edward Van Nort ("Plaintiff"), an inmate currently incarcerated at the
27 California Health Care Facility in Stockton, California, and proceeding pro se, has filed
28 a civil rights complaint ("Compl.") pursuant to 42 U.S.C. § 1983, the Americans with

1 Disabilities Act (“ADA”), 42 U.S.C. § 12101, and the Rehabilitation Act of 1973, 29
2 U.S.C. § 794 (ECF Doc. No. 1).

3 Plaintiff is a disabled “full-time wheelchair user” who claims that while he was
4 incarcerated at Richard J. Donovan Correctional Facility (“RJD”) in 2011-2013,¹ he was
5 assigned a “DPW” (Disabled Person Wheelchair) cell, but there was “not enough room
6 for [him] to turn around” without running into the wall, sink, or toilet. *See* Compl. at 12.
7 Plaintiff claims his cell configuration at RJD violated both his Eighth Amendment right
8 to be free of cruel and unusual punishment, and his rights under the ADA, which requires
9 “60 inches of clear space for a wheelchair to make a 180° turn.” *Id.* at 12-14, 20, 21.
10 Plaintiff seeks injunctive relief as well as general and punitive damages. *Id.* at 7, 21.
11 Plaintiff further alleges to have exhausted his administrative remedies before filing suit
12 pursuant to 42 U.S.C. § 1997e(a). *Id.* at 7, 27-41, Ex. 2.

13 Plaintiff has not prepaid the civil filing fee; instead he has filed a Motion to
14 Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 2).

15 **I. MOTION TO PROCEED IFP**

16 All parties instituting any civil action, suit or proceeding in a district court of the
17 United States, except an application for writ of habeas corpus, must pay a filing fee of
18 \$400. *See* 28 U.S.C. § 1914(a).² An action may proceed despite a plaintiff’s failure to
19 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
20 § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a
21 prisoner granted leave to proceed IFP remains obligated to pay the entire fee in
22 installments, regardless of whether his action is ultimately dismissed. *See* 28 U.S.C.
23 § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

24
25 ¹ While Plaintiff was still incarcerated at RJD when he filed suit, he has since filed
26 a Notice of Change of Address indicating he has since been “spirited away” to the
California Health Facility in Stockton (ECF Doc. No. 3).

27 ² In addition to the \$350 statutory fee, all parties filing civil actions on or after
28 May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a)
(Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule) (eff. May 1,
2013). However, the additional \$50 administrative fee is waived if the plaintiff is
granted leave to proceed IFP. *Id.*

1 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
2 (“PLRA”), a prisoner seeking leave to proceed IFP must submit a “certified copy of the
3 trust fund account statement (or institutional equivalent) for the prisoner for the six-
4 month period immediately preceding the filing of the complaint.” 28 U.S.C.
5 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
6 trust account statement, the Court must assess an initial payment of 20% of (a) the
7 average monthly deposits in the account for the past six months, or (b) the average
8 monthly balance in the account for the past six months, whichever is greater, unless the
9 prisoner has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
10 institution having custody of the prisoner must collect subsequent payments, assessed
11 at 20% of the preceding month’s income, in any month in which the prisoner’s account
12 exceeds \$10, and forward those payments to the Court until the entire filing fee is paid.
13 See 28 U.S.C. § 1915(b)(2).

14 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust
15 account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2.
16 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff’s trust account statement,
17 as well as the attached prison certificate issued by an accounting officer at RJD verifying
18 his account balances, and has determined that Plaintiff has no available funds from which
19 to pay filing fees at this time. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event
20 shall a prisoner be prohibited from bringing a civil action or appealing a civil action or
21 criminal judgment for the reason that the prisoner has no assets and no means by which
22 to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.
23 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based
24 solely on a “failure to pay . . . due to the lack of funds available to him when payment is
25 ordered.”).

26 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF Doc. No.
27 2) and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the
28 entire \$350 balance of the filing fees mandated must be garnished by the California

1 Department of Corrections and Rehabilitation (“CDCR”) and forwarded to the Clerk of
 2 the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
 3 § 1915(b)(1).

4 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

5 **A. Standard of Review**

6 The PLRA also obligates the Court to review complaints filed by all persons
 7 proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained in any
 8 facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of
 9 criminal law or the terms or conditions of parole, probation, pretrial release, or
 10 diversionary program,” “as soon as practicable after docketing.” *See* 28 U.S.C.
 11 §§ 1915(e)(2) and 1915A(b). Under these provisions of the PLRA, the Court must sua
 12 sponte dismiss complaints, or any portions thereof, which are frivolous, malicious, fail
 13 to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C.
 14 §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000)
 15 (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010)
 16 (discussing 28 U.S.C. § 1915A(b)).

17 All complaints must contain “a short and plain statement of the claim showing
 18 that the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations
 19 are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported
 20 by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 21 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining
 22 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that
 23 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*
 24 The “mere possibility of misconduct” falls short of meeting this plausibility standard.
 25 *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

26 “When there are well-pleaded factual allegations, a court should assume their
 27 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
 28 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)

1 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
 2 allegations of material fact and must construe those facts in the light most favorable to
 3 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
 4 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

5 However, while the court “ha[s] an obligation where the petitioner is pro se,
 6 particularly in civil rights cases, to construe the pleadings liberally and to afford the
 7 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
 8 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
 9 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of*
 10 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

11 **B. Respondeat Superior Liability**

12 As an initial matter, the Court notes that Plaintiff seeks to sue Edmund G. Brown,
 13 Jr., the Governor of California, and Dr. Jeffrey Beard, Jr., the current Secretary of the
 14 CDCR, because Brown “oversees all the operations and departments in the state . . .
 15 including the CDCR,” and Beard, in his capacity as Secretary of the CDCR is “charged
 16 with knowing the daily operations and is aware of the layout of all the prisons” in the
 17 State. *See* Compl. at 2, 15. Plaintiff makes no further mention of either Brown or Beard,
 18 and he includes no specific factual allegations of individualized constitutional or
 19 statutory wrongdoing by either of them in the body of his pleading.

20 There is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v.*
 21 *Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993); *see also Iqbal*, 556 U.S. at 676
 22 (“[V]icarious liability is inapplicable to . . . § 1983 suits.”). Instead, a plaintiff “must
 23 plead that each government-official defendant, through the official’s own individual
 24 actions, has violated the Constitution.” *Iqbal*, 556 U.S. at 676; *see also Jones v.*
 25 *Community Redevelopment Agency of City of Los Angeles*, 733 F.2d 646, 649 (9th Cir.
 26 1984) (even pro se plaintiff must “allege with at least some degree of particularity overt
 27 acts which defendants engaged in” in order to state a claim). “The inquiry into causation
 28 must be individualized and focus on the duties and responsibilities of each individual

1 defendant whose acts or omissions are alleged to have caused a constitutional
 2 deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*,
 3 423 U.S. 362, 370-71 (1976)); *see also Starr v. Baca*, 652 F.3d 1202, 1207-08 (9th Cir.
 4 2011).

5 Supervisory officials may only be held liable for the allegedly unconstitutional
 6 violations of subordinates under their purview if Plaintiff sets forth allegations which
 7 show: (1) how or to what extent they personally participated in or directed a
 8 subordinate’s actions, and (2) in either acting or failing to act, they were an actual and
 9 proximate cause of the deprivation of Plaintiff’s constitutional (or statutory) rights.
 10 *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978); *Starr*, 652 F.3d at 1207-08. As
 11 currently pleaded, Plaintiff’s Complaint fails to include *any* “factual content that [would]
 12 allow[] the court to draw [a] reasonable inference” in support of an individualized
 13 constitutional or statutory violation personally committed by either the Governor or the
 14 Secretary with respect to his cell configuration. *Iqbal*, 556 U.S. at 678.

15 For this reason, the Court finds Plaintiff’s Complaint fails to state a claim upon
 16 which relief can be granted as to Defendants Brown or Beard. *See* 28 U.S.C.
 17 § 1915(e)(2)(B)(ii), § 1915A(b)(1); *Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d at
 18 1004.

19 **C. Eighth Amendment and ADA Claims**

20 As to Plaintiff’s Eighth Amendment and ADA claims against the remaining
 21 Defendants, all prison officials at RJD or inmate appeals officials who are alleged to be
 22 directly responsible for knowing about, yet failing to address or correct the conditions
 23 in his cell or its failure to accommodate his disability, the Court finds Plaintiff’s pleading
 24 sufficient to survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and
 25 1915A(b).³ Accordingly, the Court will direct limited U.S. Marshal service on Plaintiff’s
 26

27 ³ Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is
 28 cumulative of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a
 defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D.
 Cal. 2007).

1 behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all
 2 process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court may
 3 order that service be made by a United States marshal or deputy marshal . . . if the
 4 plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”).

5 **III. CONCLUSION AND ORDER**

6 Good cause appearing, **IT IS HEREBY ORDERED** that:

7 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF
 8 Doc. No. 2) is **GRANTED**.

9 2. The Secretary of the CDCR, or his designee, is **DIRECTED** to collect from
 10 Plaintiff’s prison trust account the \$350 filing fee owed in this case by collecting
 11 monthly payments from the account in an amount equal to twenty percent (20%) of the
 12 preceding month’s income and forward payments to the Clerk of the Court each time the
 13 amount in his account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). **ALL**
 14 **PAYMENTS MUST BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
 15 **ASSIGNED TO THIS ACTION.**

16 3. The Clerk of the Court is **DIRECTED** to serve a copy of this Order on
 17 Jeffrey A. Beard, Secretary, California Department of Corrections and Rehabilitation,
 18 P.O. Box 942883, Sacramento, California, 94283-0001.

19 **IT IS FURTHER ORDERED** that:

20 4. Plaintiff’s claims against Defendants BROWN and BEARD are
 21 **DISMISSED** without prejudice for failing to state a claim upon which relief can be
 22 granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1).

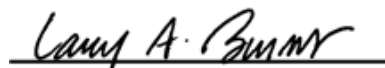
23 5. The Clerk is **DIRECTED** to issue a summons as to Plaintiff’s Complaint
 24 (ECF Doc. No. 1) upon Defendants LOZANO, ZUNIGA, PARAMO, and SUGLICH,
 25 shall and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each of
 26 these Defendants. In addition, the Clerk will provide Plaintiff with a certified copy of
 27 this Order and a certified copy of his Complaint (ECF Doc. No. 1) and the summons so
 28 that he may serve each of these Defendants. Upon receipt of this “IFP Package,”

1 Plaintiff is **DIRECTED** to complete the Form 285s as completely and accurately as
2 possible, and to return them to the United States Marshal according to the instructions
3 provided by the Clerk in the letter accompanying his IFP package. Upon receipt, the
4 U.S. Marshal is **ORDERED** to serve a copy of the Complaint and summons upon each
5 Defendant as directed by Plaintiff on the USM Form 285s. All costs of service will be
6 advanced by the United States. *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

7 6. Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint
8 within the time provided by the applicable provisions of Federal Rule of Civil Procedure
9 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted
10 to "waive the right to reply to any action brought by a prisoner confined in any jail,
11 prison, or other correctional facility under section 1983," once the Court has conducted
12 its sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus,
13 has made a preliminary determination based on the face on the pleading alone that
14 Plaintiff has a "reasonable opportunity to prevail on the merits," the defendant is required
15 to respond).

16 7. Plaintiff must serve upon the Defendants or, if appearance has been entered
17 by counsel, upon Defendants' counsel, a copy of every further pleading or other
18 document submitted for the Court's consideration. Plaintiff must include with the
19 original paper to be filed with the Clerk of the Court a certificate stating the manner in
20 which a true and correct copy of that document was served on Defendants, or counsel for
21 Defendants, and the date of that service. Any paper received by the Court which has not
22 been filed with the Clerk or which fails to include a Certificate of Service will be
23 disregarded.

24 DATED: October 17, 2014

25 

26 **HONORABLE LARRY ALAN BURNS**
27 United States District Judge
28